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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~228.~~ 34

IRVING W. FULLER AND DAVID A. McKIBBEN, LATE PARTNERS UNDER THE NAME AND STYLE OF FULLER & McKIBBEN, PLAINTIFFS IN ERROR,

vs.

HORACE B. CLAFLIN, EDWARD E. EAMES, AND EDWARD W. BANCROFT, MERCHANTS AND PARTNERS AS H. B. CLAFLIN & CO.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

2

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SUPREME COURT OF THE UNITED STATES.

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1 Be it remembered that at an adjourned term of the district court of the United States for the western district of Arkansas, begun and holden at the United States court room at Fort Smith, in said district, on Monday, the 16th day of June, A. D. 1873, among other the following proceedings were had, to wit:

On the 1st day of August, A. D. 1873, came H. B. Claflin & Co., by their attorneys, Messrs. Walker and Rogers, and filed their complaint, which complaint is in the following words and figures, to wit:

In the district court of the U. States for the western district of Arkansas.

HORACE B. CLAFLIN, EDWARD E. EAMES, AND Edward W. Bancroft, merchants and partners in trade, trading and doing business together under the name, style, and description of "H. B. Claflin & Co.," plaintiffs, *against* IRVING W. FULLER AND DAVID A. MCKIBBEN, late merchants and partners in trade, trading and doing business together under the 2 name and style of Fuller & McKibben, defendants.	Complaint at law.

The said Horace B. Claflin, Edward E. Eames, and Edward W. Bancroft, plaintiffs, who are residents of the city and citizens of the State of New York, complain of the said Irwin W. Fuller and David E. McKibben, who are residents of the city of Fort Smith, and citizens of the State of Arkansas, defendants, and thereupon allege:

1. That the said defendants, on the first of July, A. D. 1870, at said city of Fort Smith, in the State last mentioned, made their certain promissory note in writing of that date, and then and there delivered the same to the said plaintiffs, a copy of which is filed herewith, and thereby, by their said partnership names and style of "Fuller & McKibben," promised to pay to the order of the said plaintiffs, by their said partnership name and style of "H. B. Claflin & Co.," the sum of one thousand dollars, for value received, negotiable and payable without defalcation or discount, at the office of the said plaintiffs, in the city of New York, four months after date thereof, which period has since elapsed.

2. And also, that on the first day of July, A. D. 1870, at the said city of Fort Smith, the said defendants made their certain other 3 promissory note in writing of that date, and then and there delivered the same to the said plaintiffs, a copy of which is herewith filed, and thereby, by their said partnership names and style of "Fuller & McKibben," promised to pay to the order of said plaintiff, by their said partnership names and style of "H. B. Claflin & Co.," five months after date thereof, the sum of one thousand dollars, for value received, negotiable and payable without defalcation or discount at their office in New York City, & that said note has long since fell due.

That the said defendants have not, nor has either of them, paid the said several sums of money in said promissory notes specified, or either or any part of either of them, to the plaintiffs or to their order.

Wherefore, the said plaintiffs pray judgment against the defendants for the sum of two thousand dollars, the aggregate amount of the sums of money specified in said promissory notes, with interest on the one-

half of said last-mentioned sum from the second day of November, 1870, and interest on the other half from the 2d day of December, of the same year, and for other and further relief.

WALKER & ROGERS,
Attor. for Plaintiffs.

3½ (Copy.)

$1,000—.] FORT SMITH, ARK., *July 1st*, 1870.

Four months after date we promise to pay to the order of H. B. Claflin & Co. one thousand dollars, for value received, negotiable and payable, without defalcation or discount, at office of H. B. Claflin & Co., New York City.

(Signed) FULLER & McKIBBEN.

3¾ (Copy.)

$1,000—.] FORT SMITH, ARK., *July*, 1870.

Five months after date we promise to pay to the order of H. B. Chaflin & Co. one thousand dollars, for value received, negotiable and payable, without defalcation or discount, at office of H. B. Claflin & Co., New York City.

(Signed) FULLER & McKIBBEN.

4 The undersigned agree to pay all costs which shall accrue in the above-entitled cause.

August 1st, 1873.

JNO. H. ROGERS.
W. WALKER.

Which complaint is endorsed as follows, to wit: H. B. Claflin & Co. vs. Fuller & McKibben. Complaint at law. Filed August 1st, 1873. Jas. O. Churchill, clerk. Walker & Rogers, attor. for plffs.

Whereupon a summons was issued, which summons is in the following words and figures, to wit:

UNITED STATES OF AMERICA,
Western District of Arkansas:

The President of the United States, to Irving W. Fuller and David A. McKibben, late merchants and partners in trade, trading and doing business together under the name and style of "Fuller and McKibben," greeting:

5 You are hereby summoned and required to answer the complaint of Horace B. Claflin, Edward E. Eames, and Edward W. Bancroft, merchants and partners in trade, trading and doing business together under the name, style, and description of "H. B. Claflin & Co.," and file your answer thereto in the office of the clerk of the district court of the United States for the western district of Arkansas, at Fort Smith, in said district, within twenty days after the service hereof, exclusive of the day of service; and you are hereby notified that the said H. B. Claflin and Co., plaintiffs in said complaint, will take judgment against you for the sum of two thousand dollars, with interest on the one-half of said sum from the second day of November, 1870, and interest on the other half from the 2d day of December, of the same

year, and for all their costs, if you fail to answer said complaint in twenty days after the service hereof.

Witness the honorable William Story, judge of the district court of United States for the western district of Arkansas, and the seal thereof, at Fort Smith, in said district, this 1st day of August, A. D. 1873.

[SEAL.] JAS. O. CHURCHILL, *Clerk.*

6 Upon which are the following endorsements:

22. H. B. Claflin & Co. vs. Fuller and McKibben. Complaint at law. Summons. Filed August 4th, 1873. Jas. O. Churchill, clerk.

U. S. MARSHAL'S OFFICE,
Fort Smith, Arks., Aug. 4th, 1873.

I certify that I served the within writ of summons on the 4th day of August, 1873, at Fort Smith, Arkansas, by leaving a copy of the same in the hands of each of the within named, Irving W. Fuller and David A. McKibben.

JOHN N. SARBER,
U. S. Marshal,
By JOHN WILLIAMS,
Dept. Marshal.

2 services, $4.00; 2 copies, .20—$4.20.

On the 20th day of August, 1873, came Irving W. Fuller and David A. McKibben, by their attorneys, Messrs. Du Val, Cravens, and Humphreys, and filed their answer; which answer is in the following words and figures, to wit:

In the district court of the United States for the western district of Arkansas.

HORACE B. CLAFLIN, EDWARD E. EAMES,
7 and Edward W. Bancroft, late merchants and partners under the name, style, and description of "Horace B. Claflin & Co.," plaintiffs,

against

IRVING W. FULLER AND DAVID A. MCKIBBEN, late merchants and partners in trade, trading and doing business together under the name and style of Fuller & McKibben, defendants.

} Answer.

The said defendants, Irving W. Fuller and David A. McKibben, say that before the 1st day of July, A. D. 1870, to wit, in the year 1867, they, the said defendants, purchased from said plaintiffs goods, wares, and merchandise on a credit which, with the interest that accrued thereon and insurance on said property so purchased, amounted to large sums of money, all of which sums of money they, the said defendants, paid to said plaintiffs before and on the said 1st day of July, A. D. 1870, except a sum of money less than the sum of fifteen hundred and fifty dollars; that on the day on which said notes mentioned in the first and second paragraphs of said plaintiffs' complaint were executed, the said plaintiffs (through their then agent, Lyman Mallory) falsely and fraudulently represented to the said Fuller that they, these defend-
8 ants, as such late partners as aforesaid, were then indebted to said plaintiffs in the sum of three thousand four hundred and

seven dollars and seventy-three cents, and then and there exhibited to the said Fuller a false and fraudulent statement of their accounts against said defendants; and the said Fuller, not then knowing that said representations and statement of accounts and claims were false and fraudulent, and relying and confiding upon said representations and said statement of account and claims, executed the said promissory notes in the 1st and 2d paragraphs of said plaintiffs' complaint mentioned, by their said late firm name of Fuller & McKibben, and also at the same time executed another promissory note for one thousand dollars, and another promissory note for four hundred and seven dollars and $\frac{73}{100}$ dollars, to said plaintiffs, which two last-mentioned notes are not mentioned in said plaintiffs' complaint.

That since the said 1st day of July, A. D. 1870, the said defendant, David A. McKibben, has paid to said plaintiffs a sum greater than the sum of fifteen hundred and fifty dollars, which fully paid off and extinguished the indebtedness of these defendants to said plaintiffs,
9 evidenced by said two last-mentioned promissory notes, (not specified in said plaintiffs' complaint,) and overpaid all indebtedness then due and owing from said defendants as such late partners as aforesaid to said plaintiffs.

And so the said defendants say that the promissory notes mentioned in the first and second paragraphs of said plaintiffs' complaint were procured through the false and fraudulent representations of said plaintiffs

JOHN T. HUMPHREYS,
DU VAL & CRAVENS,
Attys. for Defts.

David A. McKibben, one of the above-named defendants, says he believes the statements in the foregoing answer contained are true.

D. A. McKIBBEN.

Sworn to and subscribed before me this 20th day of August, A. D. 1873.

[SEAL.] JAS. O. CHURCHILL, *Clerk.*

10 Which answer is endorsed as follows: No. . H. B. Claflin & Co. against Fuller & McKibben. Answer. Filed August 20th, 1873. Jas. O. Churchill, clerk.

Be it remembered, that at a regular term of the district court of the United States for the western district of Arkansas, begun and holden at the United States court room at Fort Smith, in said district, on the 2d Monday in November, A. D. 1873, being the day appointed by law to hold said court, among other the following proceedings were had, to wit:

* * * *

SATURDAY MORNING, 9 O'CLOCK,
November 15th, A. D. 1873.

Court met pursuant to adjournment. Present, the honorable William Story, judge of the district court of the United States for the western district of Arkansas.

* * * *

HORACE B. CLAFLIN, EDWARD E. EAMES,
11 and Edward W. Bancroft, merchants and partners in trade, trading and doing business together under the name, style, and description of "H. B. Claflin & Co.," plaintiffs,
vs.
IRVING W. FULLER AND DAVID A. MCKIBBEN, late merchants and partners in trade, trading and doing business together under the name and style of Fuller and McKibben, defendants. } No. 78.

Now, on this day come the said plaintiffs, by their attorneys, Messrs. Walker and Rogers, and file their demurrer to the joint answer heretofore filed by the defendants herein; which demurrer is in the following words and figures, to wit:

Demurrer to answer.

In the United States district court for the western dist. of Arkansas, Nov. term, A. D. 1873.

H. B. CLAFLIN & CO., PLAINTIFFS,
against
FULLER & MCKIBBEN, DEFENDANTS.

12 And the said plaintiffs, by attorney, come and demur to the answer of the said defendants, and assign for cause that the facts stated in and by said answer are not sufficient to constitute a defense to the complaint; wherefore the plaintiffs pray judgment, &c.

WALKER & ROGERS,
Attorneys for the Plaintiffs.

Which demurrer is endorsed as follows: No. 78. H. B. Claflin & Co. vs. Fuller & McKibben. Demurrer to answer. Filed in open court Nov. 15th, 1873. Jas. O. Churchill, clk.

WEDNESDAY MORNING, 9 O'CLOCK,
November 26th, A. D. 1873.

Court met pursuant to adjournment. Present, the honorable William Story, judge of the district court of the United States for the western district of Arkansas.

13 HORACE B. CLAFLIN, EDWARD E. EAMES, and Edward W. Bancroft, merchants and partners in trade, trading and doing business together under the name, style, and description of H. B. Claflin & Co., plaintiffs,
vs.
IRVING W. FULLER AND DAVID A. MCKIBBEN, late merchants and partners in trade, trading and doing business together under the name and style of Fuller & McKibben, defendants.

Now, on this day, came on to be heard the demurrer heretofore filed by plaintiffs to the defendants' answer herein, and the court having heard the same, and argument of counsel, and being fully advised therein, doth overrule the same; to which ruling of the court plaintiffs except at the time, and ask their exceptions be noted of record herein.

And thereupon, on motion of the plaintiffs, by their attorneys, Messrs. Walker and Rogers, it was ordered that said defendants make their

answer more specific, by setting forth the statement of the account therein referred to, and in what particular it was false, fraudulent, or erroneous, stating specifically and with certainty and precision the items
14 erroneously charged or omitted in said account; which motion above referred to, for defendants to make their answer more specific, is in the following words and figures, to wit:

In the U. S. dist. court for the west. dist. of Arks.

H. B. CLAFLAND & CO., PLAINTIFFS,
against
FULLER AND MCKIBBEN, DEFENDANTS.

And the said plaintiffs, by attorney, come and move the court here for an order for the defendants to make their answer more specific, by setting forth the sta'ment of the account therein referred to, and in what particular it was false, fraudulent, or erroneous, stating specifically and with certainty and precision the items erroneously charged or omitted in said account.

WALKER & ROGERS,
Attor. for Plaintiffs.

Which is endorsed as follows: H. B. Clafland & Co. vs. Fuller & McKibben. Motion for an order for defts. to make answer more specific. Filed Nov. 26th, 1873. Jas. O. Churchill, clerk. Walker & Rogers.

15 MONDAY MORNING, 9 O'CLOCK,
December 1st, A. D. 1873.

Court met pursuant to adjourment. Present, the honorable William Story, judge of the district court of the United States for the western district of Arkansas.

HORACE B. CLAFLIN, EDWARD E. EAMES, Edward W. Bancroft, merchants and partners in trade trading and doing business together, under the name, style, and description of "H. B. Claflin & Co.,"
vs.
IRVING W. FULLER AND DAVID A. MCKIBBEN, late merchants and partners in trade, trading and doing business together under the name and style of "Fuller and McKibben." — No. 87.

Now, on this day, come said defendants, by their attorneys, Messrs. Du Val and Cravens, and file their amended answer to the declaration heretofore filed by the plaintiffs herein; which amended answer is in the following words and figures, to wit:

16 In the district court of the United States for the western district of Arkansas.

HORACE B. CLAFLIN, EDWARD E. EAMES, AND Edward W. Bancroft, merchants and partners under the name, style, and description of H. B. Claflin & Co., plaintiffs,
against
IRVING W. FULLER AND DAVID A. MCKIBBEN, late merchants and partners in trade, under the name, style, and description of Fuller & McKibben, defendants.

The said defendants, Irving W. Fuller and David A. McKibben, say that

before the 27th day of January, A. D. 1868, they, the said defendants, purchased from said plaintiffs goods, wares, and merchandise which, with the interest that had accrued thereon and the insurance on said property, amounted to large sums of money, all of which sums of money these defendants, prior to the day last mentioned, had paid to said plaintiffs, except a sum of money not then exceeding the sum of nineteen thousand four hundred and forty-seven dollars and eighty-eight cents, (19,447.88.)

That on that day the said plaintiffs, at the city of New York, filled up and sent by mail to the defendants four promissory notes, bearing date the day and year aforesaid, one of which was made payable to
17 the said plaintiffs for the sum of $5,102.78.

Another of which was made payable to the said plaintiffs for the sum of $5,102.80.

Another of which was made payable to the said plaintiffs for the sum of $5,102.60.

And another of which was made payable to the said plaintiffs for the sum of $5,103.68, and all of which were for the aggregate sum of twenty thousand four hundred and eleven dollars and eighty-six cents, ($20,411.86,) which said promissory notes, so filled up as aforesaid, purporting to state and contain the sums of money in which the *the* said defendants were then indebted to said plaintiffs, were sent as aforesaid to said defendants, to be by them executed, and in which said notes, and in the aggregate sum of money for which they were made, were by the said plaintiffs falsely and fraudulently included *in* the sum of $801.73, the amount of a bill of goods and merchandise lost in transit from the said city of New York to the said city of Fort Smith, and which was included in the sum of money not exceeding the sum of $19,447.86, which these defendants then justly owed to said plaintiffs, and the value of which said lost goods ($801.73) they, said plaintiffs, had received from the insurors of said goods and merchandise; and afterwards, and before the execution of said last-mentioned notes, the said plaintiffs sent to said defendants a duplicate bill of said goods and mer-
18 chandise, with which duplicate bill for the amount last above stated the said plaintiffs falsely and fraudulently charged these defendants, and, as above stated, included the same in the aggregate sum of money they, the said plaintiffs, stated and inserted in said notes as and for the sum of money which they, said defendants, then owed to said plaintiffs.

And the said plaintiffs also fraudulently and falsely included in the aggregate of the sums of money in said promissory notes specified the sum of $162.25, the amount of a bill for balmorals, which, after being charged and included in the said sum of $19,447.88, was charged and included a second time in the said sums of money in said promissory notes specified. Which said notes were received by the said defendant, Irving W. Fuller, from the said plaintiffs on the 10th day of February, A. D. 1868. And he, the said defendant, relying on and confiding in the statements of the said plaintiffs that the sums of money specified in said promissory notes were the sums of money then due from said defendants to said plaintiffs, without any examination as to their correctness, and believing, and being induced to believe, by said statements, that said plaintiffs had given all just credits to these defendants, on the same day executed said notes, by signing thereto the late firm-
19 name of said Fuller & McKibben, and immediately forwarded the said notes by mail to said plaintiffs.

So the said defendants say that the said promissory notes, so given

and executed by said defendants, were procured by the false and fraudulent statements and representations of the plaintiffs, in the truth of which they, these defendants, relied and confided.

And afterwards, on the day on which the said Fuller for the said late firm executed the notes sued on in this action, and before the same were executed, the said plaintiffs, at the city of Fort Smith, falsely and fraudulently represented to the said Fuller that the sum of money then due and owing from said defendants to said plaintiffs was the sum of $3,407.73; and then and there exhibited to him a false and fraudulent statement of their accounts and claims against these defendants, (the original of which said statement has been lost or destroyed, but a copy of which, except the credits dated on said copy on and after July 1st, 1870, is filed with the depositions of Lyman Mallory, marked Exhibit B of said depositions in this cause:

In which said statement the said plaintiffs falsely and fraudulently represented to the said Fuller that said sum of $3,407.73 was the balance then justly due from said defendants to said plaintiffs, and in which was falsely and fraudulently charged against these defendants the sum of $20,411.86, the aggregate amount of the notes first mentioned in this answer, dated January 27th, 1868, when the true sum of money then due and owing from the said defendants to the said plaintiffs was the sum of $19,447.88.

Strike out.

And also in said statement said plaintiffs falsely and fraudulently gave credit to these defendants for the sum of $6,595.59, when they should have given credit in said statement for the sum of $7,198 $\frac{38}{100}$ *dollars*, the sum of money which they, the said plaintiffs, actually received upon the order of the said defendants from the board of underwriters at New Orleans for the proceeds of a lot of cotton belonging to these defendants, which had been sunk in the Arkansas River.

And the said plaintiffs also falsely and fraudulently omitted to give the said defendants credit in said statement in the sum of $24.22, paid by the defendants to the said plaintiffs on the 9th day of April, A. D. 1868. And in which false statement was also stated and included interest on all of said false and fraudulent items unto the 24th day of October, 1870.

That the said Fuller, not then knowing that the said representations were false and fraudulent, and confiding in said representations and statements, executed the said promissory notes sued on in this action by the said late firm-name of Fuller & McKibben, and also at the same time executed another promissory note for the sum of one thousand, and another promissory note for $407.73, to said plaintiffs.

That since the 19th day of July, A. D. 1870, the said defendants have paid to the said plaintiffs the sum of $1,557.73, which more than paid off and extinguished the sums of money specified in said last-mentioned two promissory notes not sued on in this case, and overpaid all indebtedness then due from said defendants to said plaintiffs. And so the said defendants say that the execution of the promissory notes mentioned in the first and second paragraphs of the said plaintiffs' complaint was procured by the said false and fraudulent representations of the said plaintiffs. And the said defendants further say that the said frauds so perpetrated, as above stated, by the said plaintiffs on these defendants were not discovered by them (said defendants) until the November term, A. D. 1871, of this court.

DU VAL & CRAVENS &
JOHN T. HUMPHREYS.
Attys. for Defts.

David A. McKibben, one of the defendants in the above-entitled cause, says that he believes the statements contained in the foregoing answer are true.

22 D. A. McKIBBEN.

Sworn to and subscribed before me this 1st day of December, 1873.

JAS. O. CHURCHILL,
U. S. Commissioner.

Which amended answer is endorsed as follows: No. 78. H. B. Claflin & Co. vs. Fuller & McKibben. Amended answer. Filed December 1st, 1873. Jas. O. Churchill, clerk.

TUESDAY MORNING, 9 O'CLOCK,
December 2d, A. D. 1873.

Court met pursuant to adjournment. Present, the honorable William Story, judge of the district court of the United States for the western district of Arkansas.

* * * *

HORACE B. CLAFLIN, EDWARD E. EAMES, Edward W. Bancroft, merchants and partners in trade, trading and doing business together under the name, style, and description of
23 "H. B. Claflin & Co.," plaintiffs,
vs.
IRVING W. FULLER AND DAVID A. McKIBBEN, late merchants and partners in trade, trading and doing business together under the name and style of "Fuller & McKibben," defendants. } No. 78.

Now, on this day, come the said plaintiffs, by their attorneys, Messrs. Walker and Rogers, and file their motion to strike out the amended answer heretofore filed by defendants, and for judgment herein; which motion is in the following words and figures, to wit:

Motion.

In the U. States dist. court, W. D. of Arks. Nov. term, A. D. 1873.

H. B. CLAFLAND, PLAINTIFFS,
against
FULLER & McKIBBEN, DEFENDANTS. } No. 78.

And the said plaintiffs, by attorney, come and move the court here to strike out the amended answer of the defendants, for the reason that it does not set forth the statement of the account therein alleged to be false and fraudulent, and in what particular it was false, fraudu-
24 lent, and void, nor designate the items claimed to be erroneously charged, or omitted, as required by the order of this court; and for judgment for want of sufficient answer.

WALKER & ROGERS,
Atte's for Plffs.

Which motion is endorsed as follows: No. 78. H. B. Clafland & Co., vs. Fuller & McKibben. Motion to strike out amended answer. Filed Dec. 2d, 1873. Jas. O. Churchill, clerk. Walker & Rogers.

MONDAY MORNING, 9 O'CLOCK,
December 8th, A. D. 1873.

Court met pursuant to adjournment. Present, the honorable William Story, judge of the district court of the United States for the western district of Arkansas.

HORACE B. CLAFLIN, EDWARD E. EAMES, AND Edward W. Bancroft, merchants and partners in trade, doing business together as such
25 under the name, style, and description of "H. B. Claflin & Co.," plaintiffs,
against
IRVING W. FULLER AND DAVID A. MCKIBBEN, late merchants and partners, doing business together as such, under the name and style of "Fuller & McKibben," defendants.
} No. 78. Complaint at law.

And now, on this day, the parties, plaintiffs and defendants, appeared by their respective attorneys, and the court now being well and sufficiently advised of the question of law arising upon the plaintiffs' motion to strike out the defendants' amended answer, which was argued and submitted on a former day of this term, is of opinion that the motion ought to prevail. Wherefore it is ordered by the court that said amended answer be, and the same is hereby, struck out, to which decision and ruling of the court the defendants, by their attorneys, except. And thereupon the defendants asked leave to file another amended answer on to-morrow morning, which was denied, and they excepted. And the defendants saying nothing further in bar or preclusion of the said plaintiffs' action, the same remains against them wholly undefended; wherefore the plaintiffs ought to recover the several sums of money in their com-
26 plaint demanded, and the interest that has accrued thereon. It is therefore considered by the court here that the plaintiffs do have and recover of and from the said defendants the sum of two thousand one hundred and ninety-nine dollars and sixty-two cents, ($2,199\frac{62}{100}$,) that being the aggregate amount of the principal debt and interest, together with all their costs in and about this suit in this behalf laid out and expended, and that they have execution therefor.

WEDNESDAY MORNING, 9 O'CLOCK,
December 17th, A. D. 1873.

Court met pursuant to adjournment. Present the honorable William Story, judge of the district court of the United States for the western district of Arkansas.

HORACE B. CLAFLIN, EDWARD E. EAMES, AND Edward W. Bancroft, merchants and partners in trade, trading and doing business together under the name, style, and description of "H. B. Claflin & Co.," plaintiffs,
against
IRVING W. FULLER AND DAVID A. MCKIBBEN, late merchants and partners in trade, trading and doing business together under the
27 name and style of "Fuller & McKibben," defendants.
} No. 78.

On this day come the said defendants, and file a writ of error to remove

the record and proceedings in this court to the Supreme Court of the United States for correction, and at the same time filed a bond to the said plaintiffs in the sum of four thousand three hundred and ninety-nine dollars and twenty-four cents, ($4,399\frac{24}{100}$,) with Jacob Barr, William Ferguson, F. W. Boas, and T. G. Scott as their sureties, which is approved as sufficient by the court. Which bond is in the following words and figures, to wit:

Bond.

HORACE B. CLAFLIN, EDWARD E. EAMES, AND Edward W. Bancroft, merchants and partners, trading and doing business under the name and style of H. B. Claflin & Co., plaintiffs,
vs.
IRVING W. FULLER AND DAVID A. MCKIBBEN, late merchants and partners, under the name and style of Fuller & McKibben, defendants.

Know all men by these presents, that we, Irving W. Fuller and David A. McKibben, Jacob Barr, William Ferguson, F. W. Boas, and
28 T. G. Scott, of the county of Sebastian and State of Arkansas, are held and firmly bound unto the said Horace B. Claflin, Edward E. Eames, and Edward W. Bancroft, merchants and partners, under the firm-name and style of H. B. Claflin & Co., in the sum of four thousand three hundred and ninety-nine $\frac{24}{100}$ dollars, to be paid to the said H. B. Claflin & Co., their executors and administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 17th day of December, A. D. 1873.

Whereas the above-named Irving W. Fuller and David A. McKibben hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment in the above-entitled suit by the district court of the United States for the western district of Arkansas:

Now, therefore, the condition of this obligation is such, that if the above-named Irving W. Fuller and David A. McKibben shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Sealed and delivered in presence of—

DAVID A. MCKIBBEN.
29 JACOB BARR.
WILLIAM FERGUSON.
F. W. BOAS.
T. G. SCOTT.

In the district court of the United States for the western district of Arkansas.

H. B. CLAFLIN & CO., PLAINTIFFS,
vs.
FULLER & MCKIBBEN, DEFENDANTS.

Jacob Barr says that he is a resident of the western district of Arkansas; that he is worth fifteen hundred dollars beyond the amount o

his debts, and has property subject to execution of the value of fifteen hundred dollars.

JACOB BARR.

Sworn to before me this 18th day of December, A. D. 1873.
[SEAL.] JAMES O. CHURCHILL, *Clerk*,
By J. M. HARRUB, *D. C.*

Thomas G. Scott, one of the sureties on the bond of defendants' supersedeas in the above-entitled cause, says that he is a resident of the western district of Arkansas; that he is worth five thousand dollars beyond the amount of his debts, and has property subject to execution of the value of five thousand dollars.

30 THOS. G. SCOTT.

Sworn to before me this 18th day of December, A. D. 1873.
[SEAL.] JAS. O. CHURCHILL,
U. S. Commissioner.

Which bond is endorsed as follows, to wit: H. B. Claflin & Co. vs. Fuller & McKibben. Bond. Filed in open court December 18th, A. D. 1873. Jas. O. Churchill, clerk.

UNITED STATES OF AMERICA,
Western District of Arkansas:

I, James O. Churchill, clerk of the district court of the United States for the western district of Arkansas, do hereby certify that the foregoing is a true, correct, and complete copy of all the papers and proceedings in the case of Horace B. Claflin, Edward E. Eames, and
31 Edward W. Bancroft, merchants and partners in trade, doing business together under the name, style, and description of H. B. Claflin & Co., against Irving W. Fuller & David A. McKibben, late merchants & partners in trade, trading and doing business together under the name and style of Fuller & McKibben. I further certify that judgment was rendered for the plaintiffs in the above-entitled cause on the 8th day of December, A. D. 1873, which transcript is herewith transmitted, in obedience to the writ of error hereto attached.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Fort Smith, in said district, this 5th day of August, A. D. 1874.

[SEAL.] JAS. O. CHURCHILL, *Clerk.*

32 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judge of the district court of the United States for the western district of Arkansas, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in said district court before you, between Horace B. Claflin, Edward E. Eames, and Edward W. Bancroft, partners in trade under the firm-name and style of H. B. Claflin & Co., and Irving W. Fuller and David A. McKibben, late partners under the name and style of Fuller & McKibben, a manifest error hath happened, to the great damage of the said Fuller & McKibben, as by their complaint appears;

We, being willing that the error, if any hath been, should be duly

corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday in December next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may
33 cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Nathan Clifford, senior justice of the said Supreme Court, the 17th day of December, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] JAS. O. CHURCHILL,
Clerk of the District Court of the United States for the Western District of Arkansas.

(Indorsed:) Fuller & McKibben, plffs. in error, vs. H. B. Claflin & Co., defendants in error. Writ of error. Deposited in my office by Messrs. Du Val & Cravens, attorneys for plaintiffs in error, December 17th, 1873. Jas. O. Churchill, clerk.

34 UNITED STATES OF AMERICA, *ss:*

To Horace B. Claflin, Edward E. Eames, and Edward W. Bancroft, merchants and partners under the firm-name and style of H. B. Claflin & Co., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the western district of Arkansas, wherein Irving W. Fuller and David A. McKibben are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, senior justice of the said Supreme Court of the United States, this 17th day of December, in the year of our Lord one thousand eight hundred and seventy-three.

WM. STORY, *Judge.*

35 (Indorsed:) 75. Fuller & McKibben, plffs. in error, vs. H. B. Claflin & Co., defendants in error. Citation.

In the district court of the United States for the western district of Arkansas.

On this day comes before me, James O. Churchill, clerk of said court, E. M. Maire, dep'ty U. S. marshal, and being duly sworn, states on oath that he served the within citation at Fort Smith, Arkansas, on 26th day of December, A. D. 1873, by then and there delivering a true copy of the same to Messrs. Walker & Meyers, attorneys of record for H. B. Claflin & Co., in the case therein mentioned.

E. M. MAIRE,
Depty. U. S. Marshal.

Sworn to before me this 26 day of December, A. D. 1873.
JAS. O. CHURCHILL,
Clerk.

36 Supreme Court of the United States.

IRVING W. FULLER AND DAVID A. MCKIBBEN, late merchants and partners in trade under the name, style, and description of Fuller & McKibben,
v.
HORACE B. CLAFLIN, EDWARD E. EAMES, AND Edward W. Bancroft, merchants and partners under the name, style, and description of "H. B. Claflin & Co." } In error.

Of October term, in the year of our Lord one thousand eight hundred and seventy-four.

Afterwards, to wit, on the first Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said Irving W. Fuller and David A. McKibben, late merchants and partners in trade under the name, style, and description of "Fuller & McKibben," by their attorney, Ben. T. Du Val, and say that in the record and proceedings aforesaid
37 there is manifest error, in this, to wit:

1st. That the declaration aforesaid and the matters therein contained are not sufficient in law for the said Horace B. Claflin, Edward E. Eames, and Edward W. Bancroft, merchants and partners under the name, style, and description of H. B. Claflin & Co., to have or ma'ntain their aforesaid action thereof against the said Irving W. Fuller and David A. McKibben, late merchants and partners in trade under the name, style, and description of Fuller & McKibben.

2d. There is also error in this, that it appears from the record aforesaid that the court sustained the motion of said H. B. Claflin & Co., defendants in error, to compel Fuller & McKibben, plaintiffs in error, to make their answer, filed on the 20th day of August, 1873, more specific and certain, after overruling a demurrer filed to the same answer, when the court should have overruled said motion of said "H. B. Claflin & Co." to make said answer more specific and certain.

3d. There is also error in this, to wit: That by the record aforesaid it appears that on the 8th day of December, 1873, the court struck
38 out the amended answer of the said Fuller & McKibben, filed in said cause, on the 1st day of December, 1873, when the motion to strike out the same should have been overruled by the said court.

4th. There is also error in this, to wit: That by the record it appears that the court, on the 8th day of December, 1873, rendered judgement in favor of the said "H. B. Claflin & Co." against the said Fuller & McKibben in this cause without having made any disposition of the answer filed by the said Fuller & McKibben on the 20th day of August, 1873, and while said answer was a full and complete defence to all the matters and things contained in the 1st and 2d paragraphs of the complaint of said H. B. Claflin & Co. in this cause, and was so decided by the court in its decision upon the demurrer thereto, whereas no judgment should have been rendered in favor of the said H. B. Claflin & Co.

against the said Fuller & McKibben until said answer, filed August 20th, 1873, had been by the court disposed of.

5th. There is also error in this, to wit: That by the record it
39 appears that the motion of said H. B. Claflin & Co. to strike out the amended answer of the said Fuller & McKibben was by the court sustained, and said amended answer was by the court stricken out, whereas the court should have overruled said motion to strike out said amended answer.

6th. There is also error in this, to wit: That by the record it appears that the said Fuller & McKibben, on the said 8th day of December, 1874, asked leave until the morning of the following day to render their said amended answer more specific and certain, and that the court refused to allow them that time so to do, no reason appearing for said refusal to allow said Fuller & McKibben said time to render their said amended answer more specific and certain.

7th. That by the record aforesaid it appears that the judgment aforesaid was given for said H. B. Claflin & Co. against the said Fuller & McKibben, whereas by the law of the land the said judgment ought to have been given for the said Fuller & McKibben against the said "H. B. Claflin & Co." And the said Fuller & McKibben pray that the
40 judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgment, &c.

BEN. T. DU VAL,
Attorney for Plaintiff in Error.

(Indorsed:) Sup. Court U. S. 1874, Octo. term. No. 473. Irving W. Fuller & D. A. McKibben, plffs. in error, vs. H. B. Claflin & Co. Assignment of errors. Filed 1st September, 1874.

(Indorsement on cover:) No. 228. Irving W. Fuller and David A. McKibben, late partners under the name and style of Fuller & McKibben, plaintiffs in error, vs. Horace B. Claflin, Edward E. Eames, and Edward W. Bancroft, merchants and partners under the firm-name and style of H. B. Claflin & Co. W. Arkansas, D. C. U. S. Filed 15th August, 1874.

IN THE SUPREME COURT OF THE UNITED STATES.

—o—

IRVING W. FULLER and DAVID A. MCKIBBEN, late partners, under the name and style of FULLER & MCKIBBEN,	Plaintiffs in error.
VS.	228
HORACE B. CLAFLIN, EDWARD E. EAMES and EDWARD W. BANCROFT, Merchants and partners, as H. B. CLAFLIN & Co.,	Defendants in error

STATEMENT OF CASE.

On 1st day of August, A. D. 1873, the defendants in error commenced an action against the plaintiffs in error, in the District Court of the United States for the Western District of Arkansas, on two promissory notes, executed by the latter to the former, dated on 1st day of July, 1870, each for the sum of One Thousand Dollars, one payable in four and the other in five months after date.

On 20th day of August, A. D. 1873, the defendants in said action filed their answer, alleging that said notes were procured through the false and fraudulent representation of the plaintiff; said answer setting forth in what such false and fraudulent representations consisted. (See pages 3 and 4 of Record.)

At the next term, November, 1873, the plaintiffs filed a general demurrer to said answer, and on 26th November, after hearing the argument of counsel, the Court overruled the demurrer, and on motion of the plaintiff's attorneys, the Court ordered the defendants to make their answer more specific, by "setting forth the statement of the account therein referred to, and in what particular it was false, fraudulent or erroneous, stating specifically, and with certainty and precision the items erroneously charged or omitted in said account"—(pages 5 and 6 of Record.)

On 1st December the defendants filed an amended answer, in which they set out a statement of their dealings with the plaintiffs, and specified various errors and omission of items, which they alleged to be fraudulent, by which in the final statement rendered July 1st, 1870, the defendants were falsely and fraudulently claimed to be indebted to the plaintiffs in the sum of $3,407 73-100, and that defendants had, subsequently to that date, paid all they justly owed to the plaintiffs, concluding with the averment that the notes sued on had been obtained by the false and fraudulent representations of the plaintiffs, and that the frauds had not been discovered until November term, 1871, of said Court. (See pages 7, 8 and 9 of Record.

On 2d December plaintiffs filed their motion to strike out the amended answer for the reason that it did not set forth the statement of the account therein alleged to be false and fraudulent, and in what particular it was false, fraudulent and *void*, nor designate the items claimed to be erroneously charged or omitted as required by the order of the Court. (Page 9.)

On 8th day of December the Court sustained the motion and struck out the amended answer, and refused to allow defendants until the following morning to file a further amended answer, and rendered judgment in favor of the plaintiffs against the defendants for the principal and interest of the notes sued on. The defendants excepted to the order striking out their amended answer, and also to the refusal of the Court to allow time to file another amended answer, which exceptions were noted on the Record—page 10.

The defendants sued out a writ of error and brought the cause to this court for revision.

On 1st day of September, 1874, the plaintiffs in error filed in the office of the Clerk of this Court their assignment of errors, on pages 14 and 15 of the Record.

The first error assigned is that the declaration is not sufficient. This will not be insisted on, because, if true, it should have been met by demurrer. The second, that the Court sustained the motion of the defendants in error to compel the plaintiffs in error to make their answer more specific and certain, after overruling a demurrer to the same answer.

Sec. 4018, Arkansas Digest, 1874, provides, "When the allegations of a pleading are so indefinite or uncertain that the precise nature of the claim or defense is not apparent, the Court may require the pleading to be made definite and certain by amendment."

The answers filed August 20, 1873, alleged that the notes sued on were procured through the false and fraudulent representations of the plaintiffs, and set out the fact that the agent of the plaintiffs exhibited to the defendants a false and fraudulent statement of their accounts, in which a balance of $3,407 73-100 was due, when, in fact, only $1,550 were due, and that the notes sued on and two others were executed by defendant Fuller in the firm name of Fuller & McKibben, who was influenced to do so by the fraud of the plaintiffs' agent.

The Court held the plea to be good on demurrer, the nature of the defense must have been *apparent* to the Court, and that the facts, if true, (see page 5) were a defense to the action. The Court, notwithstanding on motion of plaintiff's counsel, ordered the said defendants to make the answer more specific by setting forth the statement of the account therein referred to, and in what particular it was false, fraudulent or erroneous, stating specifically, and with certainty and precision, the items erroneously charged or omitted in said account. (See pages 5 and 6 of Record.)

The defendants afterwards and in obedience to this erroneous order of the Court, filed an amended answer in which they set forth specifically and with particularity, the dealing between the parties showing the true

amount due on July 1st 1870. That the plaintiffs on that day presented to the defendants a false and fraudulent statement of their claims and accounts, averring that the original had been lost or destroyed, and referred to a copy then on file with the deposition of one Lyman Mallory, in this cause, marked "Exhibit B" and pointed out various errors and omissions of credits which ought to have been given to the defendants. (Pages 7 and 8 of Record.)

The answer complied with the order of the Court in every particular except in exhibiting the ~~instalment of~~ account, which they could not do by reason of its having been lost or destroyed.

The most remarkable feature in this extraordinary case is the striking out this answer on motion of the plaintiffs.

This is assigned as the third error

The Court had overruled the demurrer to the first answer, the second was of the same nature and impeached the notes for fraud.

It set up a valid defense and pointed out with "certainty and precision the items erroneously charged and omitted in the account," and referred to the account exhibited with the plaintiffs' depositions. The motion of plaintiff is to strike out the amended answer "for the reason that it does not set forth the statement of the account therein alleged to be false and fraudulent, and in what particular it was false, fraudulent and void, nor designate the items claimed to be erroneously charged or omitted by the order of this Court"—page 9.

The action of the court in this case presents no question except as to whether the defendants had complied substantially with its order,

The defendants evinced a willingness to comply with the requirements of the order, and did do so.

The Court in a most arbitrary oppressive and unreasonable manner struck out the defendants' answer, and rendered judgment against them notwithstanding the fact that it had held after argument on demurrer that the first plea was a good defence to the plaintiffs' action. We concede that a Court may, with or without a motion strike out a frivolous or sham plea or under

the old system of pleading one not applicable to the form of action—and under the code an answer, not verified when it is necessary, may be struck out if the defendant refuse to verify the answer.

The Court below had after argument upon demurrer held the first answer to be good and yet arbitrarily struck out the amended answer which was more specific and definite, and in truth, prevented the same ground of defence.

The answer was good, although it aimed at the impeachment of an account. The whole range of the dealings between the parties which had preceded the presentation of the statement of the account in which a false balance was claimed was brought for review by the answer. In Perkins vs. Hart, 11 Wheaton 237, this Court held that a stated account may be impeached at law as in equity by proof of unfairness and mistake.

This has been the settled practice ever since that decision. Formerly it was thought necessary in such cases to resort to a Court of equity to impeach an account stated. In Arkansas the law expressly declares that the consideration of even a writing obligatory may be impeached by a sworn plea.

Fraud vitiates everything is a maxim of the law. If an answer contain facts which if properly stated constitute a defence to an action it is the duty of the Court to permit the party to amend it, so that the case may be tried and determined on its merits.

In the case under consideration the Court acted as if the defendants had no right to be heard in defence of the suit brought against them. Without a shadow of right it arbitrarily struck their answer from the files and rendered judgment against them when they were pleading for time to still further amend their pleadings, and conform more perfectly if possible, to the order of the Court.

In looking over the record in this case it is no wonder that the conduct of the judge in this particular was made one of the charges against him before the 43rd Congress by the members of the bar—the result of which was his compulsory resignation to avoid impeachment.

If the defendants had been induced by the fraudulent representations of the plaintiff supported by a false statement of the accounts between them to execute the notes sued on it was a good defence at law. The more we examine the answer the greater our astonishment at the action of the Court in striking it out and rendering judgment for the plaintiffs.

The code of practice declares that amendments may be made at any time in furtherance of justice.

The answer was not alleged by the plaintiffs to be false or sham. When answers are sworn to, there can be no such thing as a sham answer, 1st Nash Pleading and Practice 249. We concede that the Court still has the power to strike out an answer where the falsehood or immateriality of the answer is apparent. This power should be carefully exercised and not extended beyond its just limits. It is a power simply to inquire whether there is in fact any question to be tried and if there is not—but the defence is a plain fiction—to strike out the fictitious defence. The People vs McCormich 18 N. Y., 315. The amended answer here did set out a series of facts, of erroneous and false items in the account by which a false balance was represented to be due the plaintiffs. There is no rule of law which forbid them from reopening the whole account and thereby showing that the notes sued on were without consideration. Newman in his treatise on pleading and practice says, "It may be asserted as generally true that the plaintiff will not be permitted to treat any answer which is sworn to as a sham plea and for that reason take judgment disregarding the answer."

Newman's Pleading and Practice, 545. He further observes on same page, "Under the present practice, if it clearly appeared on the face of the record that an answer was false, the Court might on motion *perhaps strike* such an answer from the cause inasmuch as such pleading is a manifest abuse of justice."

Under the old system the rule is stated by Chitty to be that "Sham pleading is the pleading a matter known by the party to be false for the purpose of delay or other unworthy object. 1 Chitty, Pl. 541.

A plea will not be stricken out as frivolous unless it

be obviously and grossly so. Hogencamp vs. Ackerman, (N. J.) 133; Fuller v. Stickney, 2 John 541; Bowen v. Burell, 6 Wend 571.

The 6th error assigned is that the Court refused to allow the defendants until the following morning to render the amended answer more specific and certain, or to file another amended answer.

How they could have rendered their answer more definite, and more clearly informed the Court and the plaintiffs of the nature of their defense, we are at a loss to conjecture. The account referred to was on file among the papers in the case, attached to the plaintiff's depositions and was referred to in the answer. The defendants were guilty of no *laches* or delay in presenting their defense to the action. There is nothing apparent upon the face of the record to show that they were maneuvering for delay merely, or other unworthy purposes. On the contrary, it would appear that the Court was willing and anxious to avoid the trouble of a trial, and did not hesitate to sacrifice the defendants. It looks as if the reason assigned for striking the answer from the files was a mere pretext, and the result of a deliberate judgment, having due regard to the rights of the defendant.

Under the code of practice in Arkansas, where the decision objected to is entered of record, and the ground of objection appear in the entry the exception may be taken by the party causing to be noted, at the end of the decision, that he excepts.

Section 4696, Arkansas Digest, 1874.

The error in this case was in ordering the amended answer to be stricken out—to which ruling and decision of the Court the defendants by their attorneys excepted, which is noted in the entry at the end of the decision. (See Record, page 10.) This is sufficient to bring the action of the Court below before this Court for review.

Respectfully submitted,

BEN. T. DUVAL,

Counsel for Plaintiffs in error.

February 5, 1876.

Supreme Court of the United States.

OCTOBER TERM, 1875.

No 228.

IRVING W. FULLER AND DAVID A. McKIBBEN,

Plaintiffs in Error,

against

H. B. CLAFLIN & CO.,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

ISAAC DAYTON,

of Counsel.

NEW YORK:

TOBITT & BUNCE, PRINTERS, 131 WILLIAM STREET.

1876.

Supreme Court of the United States.

IRVING W. FULLER and DAVID A. MCKIBBEN, late merchants and partners in trade under the name and style of FULLER & MCKIBBEN,
Plaintiffs in error,

against

HORACE B. CLAFLIN, EDWARD E. EAMES, and EDWARD W. BANCROFT, merchants and partners under the name and style of H. B. CLAFLIN & COMPANY,
Defendants in error.

No. 228.
In error to the District Court of the United States for the western district of Arkansas.

STATEMENT OF CASE.

This was an action at law upon two promissory notes given by the plaintiffs in error to the defendants in error, who were plaintiffs in the court below. The defendants appeared in the action, and on August 20, 1873, filed their answer, alleging, in substance that the notes sued upon, and two others of the same date, given by defendants to plaintiffs, which had been paid before the commencement of this action, were given for the payment of a balance claimed by plaintiffs to

be owing from defendants on book accounts, when, in fact, the amount owing on the account was less than the amount of the last-named two notes which had been paid, and that the execution of the notes in suit was procured by means of false and fraudulent representations, that is to say, by exhibiting to defendants a false and fraudulent statement of the account.

Plaintiffs demurred to the answer. By the order of the court made November 26, 1873, the demurrer was overruled, but on plaintiffs' motion, the defendants were by the same order required to make their answer more specific by setting forth the statement of the account therein referred to, and in what particular it was false and fraudulent, stating specifically and with certainty and precision the items erroneously charged or omitted in said account.

The defendants on December 1, 1873, filed an amended answer substantially the same as the original answer.

On December 2, 1873, the plaintiffs moved the court to strike out the amended answer of the defendants, "for the reason that it does not set forth the statement of the account therein alleged to be false and fraudulent, and in what particular it was false, fraudulent, and void, nor designate the items claimed to be erroneously charged or omitted, as required by the order of the court; and for judgment for want of such sufficient answer."

On December 8, 1873, the court made an order reciting that in the opinion of the court the motion of the plaintiffs ought to prevail, and ordering that the amended answer be struck out, to which decision and ruling of the court, it is stated in the order, the defendants excepted. "And thereupon" as it is recited in the order (case, p. 10), "the defendants asked leave to file another amended answer on the next day morning, which was denied, and they excepted."

Judgment was thereupon entered against the defendants by default for want of an answer.

There is not any bill of exceptions in the case.

POINTS FOR DEFENDANTS IN ERROR.

I. As to the first assignment of error.

There was not any objection to the declaration taken in the court below, nor is any defect pointed out in this assignment of error.

The declaration was good.

II. The only question raised by the present case is whether the court on striking out the amended answer, on December 8, 1873, ought to have given the defendants until "to-morrow morning" to file another amended answer.

It is true that it is stated in the case, that the defendants excepted to the order of the court striking out the amended answer. But if the amended answer was good, there was not any occasion for another amended answer. The defendants at one moment claimed that their amended answer was good, and excepted to its being stricken out, and the next moment asked time to amend it. There is not in the case anything to show what their new amended answer would have been.

The court below was clearly right in denying the defendants' motion.

III. The order directing the answer of August 20, 1873, to be made more specific and certain, is not an appealable order. Such an application is addressed entirely to the

discretion of the court below, and unless the discretion is abused, the action of that court will not be reviewed.

Cathcart *v.* Peck, 11 *Minn.* 45.
Watt *v.* Watt, 2 *Robt.* (*N. Y.*) 85.
Geis *v.* Loew, 36 *N. Y. Sup'r. Ct. R.* 190.
Dudley *v.* Geisler, 37 *Id.* 412.

IV. The amended answer, though copied in the transcript, is no part of the record.

When pleas are stricken out by the court, and not brought upon the record by bill of exception to the opinion of the court ordering them to be stricken out, they can not in any manner be regarded in the court above.

Pelham *v.* Page, 6 *Arks.* 535.
Walker *v.* Wills, 5 *Id.* 166.
Fort *v.* Hundley, *Id.* 179.
Kelley *v.* Matthews, *Id.* 223.

V. Both answers were bad in that it is not shown in either in what the alleged fraud consisted, or how, or in what manner, it was effected. Fraud, in pleading, must be set forth specifically, in particular and in detail, so that the court may determine whether the facts pleaded constitute fraud, and the person against whom it is charged may have the opportunity of knowing what he has to meet, and of shaping his defense accordingly.

Fraud is a conclusion of law; and it is wholly immaterial and insufficient to allege that an instrument has been obtained by fraud unless the things done constituting the fraud are stated.

Harding *v.* Handy, 11 *Wheat.* 103.
Conway *v.* Ellison, 14 *Arks.* 366.
Pendleton *v.* Galloway, 9 *Ohio*, 178.
Spence *v.* Buren, 3 *Ala.* 231.

VI. There is a distinction between an amended answer and a supplemental answer. The former must be complete in itself.

Kortzendorfer *v.* St. Louis, 52 *Mo.* 204.

In this case the amended answer was a substitute for the answer filed on August 20, 1873, and not an addition to it. It purported to be complete in itself, and did, in fact, contain all the allegations of the original answer. The amended answer was the only answer in the case after it was filed, and the answer of August 20, 1873, was not revived by striking out its substitute.

Kortzendorfer *v.* St. Louis, 52 *Mo.* 204.
White *v.* Hampton, 9 *Iowa*, 181.
Bates *v.* Kemp, 12 *Id.* 99.
Forcheimer *v.* Holly, 14 *Fla.* 239.
Kirkpatrick *v.* Holman, 25 *Ind.* 293.
Kehland *v.* Sedgwick, 17 *Cal.* 123.
Kapp *v.* Barthan, 1 *E. D. Smith* (*N. Y.*) 622.
Seneca Co. Bank *v.* Garlinghouse, 4 *How. Pr.* (*N. Y.*) 174.

VII. The application for time to file another amended answer was addressed to the discretion of the court, and the exercise of that discretion is not reviewable.

Mandeville *v.* Wilson, 5 *Cranch.* 15.
Insurance Co. *v.* Hodgson, 6 *Id.* 206.
United States *v.* Buford, 3 *Pet.* 12.
Walden *v.* Craig, 9 *Wheat.* 576.
Chirac *v.* Reinicker, 11 *Id.* 302.
Connor *v.* Peugh, 18 *How.* 397.
Dean *v.* Mason, 20 *Id.* 198.
Reid *v.* Allen, 18 *Tex.* 241.
Thomson *v.* McHenry, 18 *Ark.* 537.
Miller *v.* Fraley, 23 *Id.* 735.

The allowance of a second amendment is in the discretion of the court below, and will not be reviewed.

Stearns *v.* Martin, 4 *Cal.* 227.

VIII. The judgment ought to be affirmed.

ISAAC DAYTON,

Of counsel for defendants in error..